

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Review of the Section 251 Unbundling Obligations of the Incumbent Local Exchange Carriers)	CC Docket No. 01-338
)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996)	CC Docket No. 96-98
)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability)	CC Docket No. 98-147

**REPLY COMMENTS REGARDING
PETITIONS FOR RECONSIDERATION**

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Allegiance Telecom, Inc., Cbeyond Communications, El Paso Networks, LLC, Focal Communications Corporation, FPL FiberNet, LLC, McLeodUSA Telecommunications Services, Inc., Mpower Communications Corp., and TDS Metrocom, LLC (collectively “CLECs”), through undersigned counsel submit their Reply Comments Regarding Petitions for Clarification and/or Partial Reconsideration (“Petitions”) of the *Triennial Review Order*¹ filed by BellSouth Corporation (“BellSouth”), SureWest Communications (“SureWest”) and the US Internet Industry Association (“USIIA”).

I. ILECS MUST PROVIDE TDM-EQUIVALENT UNBUNDLING

A few commenters echo BellSouth’s request to allow ILECs to deploy next-generation loops or upgrade existing loops without preserving TDM capabilities.² Commenters reiterate

¹ *Review of the Section 251 Unbundled Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capacity*, CC Docket No. 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36 (rel. August 21, 2003) (“*Triennial Review Order*”).

² SBC Comments at 9; Verizon Comments at 25; Catena Comments at 13.

their position that if the Commission allows such a rule, it should specify that ILECs provide a substitute equivalent path over packetized next generation networks.

The Commission should reject ILEC's broader request to, in effect, phase out TDM, first, because this would be unlawful in light of the finding in the *Triennial Review Order* that CLECs would be impaired without access to TDM. Further, BOCs are urging a phasing-out of TDM solely for anticompetitive reasons. SBC now suggests that retention of TDM-capability would be inefficient and undermine its incentive to invest when a few months ago, before the Order was issued, SBC stated that it planned to retain TDM capability in its next-generation networks.³ Thus, it is clear that RBOCs are planning to make network deployment decisions not based on "sound engineering principles" but based on precluding competitive access to CLECs. In addition, as the Commission found in the *Triennial Review Order*, "the Commission's pricing rules for UNEs already ensure that competitive LECs are paying appropriate rates for UNEs and UNE combinations, and that incumbent LECs are adequately compensated for the use of their networks." *Triennial Review Order*, ¶ 582. Thus, the RBOCs should have more reason to invest in new facilities because wholesale revenues from CLECs can be used to recover the cost of the facilities.

Additionally, preserving equivalent access capability for CLECs does not constitute deploying a superior network for the same reason that requiring RBOCs to perform routine facility modifications to make these facilities "available" is not requiring superior access. *See Triennial Review Order*, ¶ 639. If an ILEC deploys a new loop or modifies an existing loop to provide better service to a retail customer, a CLEC is entitled to non-discriminatory unbundled

³ See CC Docket No. 01-338, *Ex Parte* Presentation of SBC Communications, Inc. at 3 (January 15, 2003).

access to that facility. If this entails providing a substitute, equivalent path over the packetized facility for the CLEC, then the RBOC is required to do so.

Verizon contends that ILECs are not required to unbundle DS1 and DS3 loops where there is no TDM capability deployed for those loops. The Commission made no such ruling. In fact, the Commission explicitly stated that ILECs must provide unbundled access to DS1 loops regardless of the technology employed.⁴ Thus, the Commission, in the *Triennial Review Order*, unequivocally stated:

DS1 loops will be available to requesting carriers, without limitation, regardless of the technology used to provide such loops, *e.g.*, two-wire and four-wire HDSL or SHDSL, fiber optics, or radio, used by the incumbent LEC to provision such loops and regardless of the customer for which the requesting carrier will serve unless otherwise specifically indicated. *See supra* Part VI.A.4.a.(v) (discussing FTTH). The unbundling obligation associated with DS1 loops is in no way limited by the rules we adopt today with respect to hybrid loops typically used to serve mass market customers.⁵

Clearly pursuant to this language, ILEC loop unbundling obligations include DS1 loop capacity, encompass fiber loops, apply regardless of customer class, and are not limited by the hybrid loop rules.

II. THE COMMISSION SHOULD NOT FURTHER EXTEND ALREADY UNWARRANTED FIBER UNBUNDLING EXEMPTIONS

Some commenters propose a variety of unwarranted expansions to fiber unbundling exemptions. Among the proposed exemptions: (1) all fiber facilities to the mass market serving customers with up to 48 numbers;⁶ (2) fiber to multi-unit premises, even when the inside wiring is copper, and even when small businesses are located in the premises;⁷ (3) fiber to enterprise

⁴ *Triennial Review Order*, ¶ 325, n. 956.

⁵ *Triennial Review Order*, ¶ 325, n. 956.

⁶ Verizon Comments at 19.

⁷ Verizon Comments at 21

customers;⁸ (4) new dark fiber to enterprise customers;⁹ and (5) greenfield and brownfield fiber-to-the-curb loops.¹⁰ None of these proposed expansions is warranted. We address these in turn.

Fiber to the Mass Market . Verizon states that it is not entirely clear whether the FTTH exemption actually includes fiber-based loops serving all mass market customers, and that if it does not, the exemption should apply up to customers with up to 48 numbers. For all the reasons stated in CLECs' Opposition, the Commission should reject this proposal to expand the FTTH exemption to any class of business customers. Instead, assuming the Commission does not rescind the rule entirely, the Commission should establish a residential/business split.

The Commission should particularly reject the proposed "uniform, bright line" definition of the mass market as customers with up to 48 telephone numbers. This proposal is absurd on its face, and Verizon has provided no support for it. Moreover, in any given telecommunications arrangement with 48 telephone numbers, this figure may not reflect the actual number of access lines needed. For instance, for some customers, lines will be needed for long distance, data connections to an ISP, direct lines to satellite offices to support local area networks (LAN) as well as lines to security locations. Thus, there are many enterprise customers that could potentially have fewer than 48 telephone numbers assigned but have significant telecommunications needs.¹¹ In fact, any enterprise customer with its own PBX has few telephone numbers assigned, but many telecommunications paths available. The 48 number test, then, could disqualify some enterprise customers, including potentially many large ones.

⁸ Verizon Comments at 28.

⁹ SBC Comments at 4-5.

¹⁰ HTBC Comments at 7-10.

¹¹ For example, a call center for a catalog company may only have a few, or even only one, telephone number(s) for its customers to access the call center. The calls to that number would be directed over multiple trunks to the enterprise customer's (the catalog company) telephone equipment. Thus, while there may only be a few telephone numbers assigned, there could be thousands of telephone lines used to serve those numbers.

The other “evidence” submitted by Verizon does not show any basis for broadband unbundling relief for business customers, even assuming the Commission’s broadband unbundling approach was otherwise lawful. There is virtually no cable modem service offered to business subscribers.¹² Further, 92% of CLEC FTTH deployment is from two companies. One of the companies is Eagle Broadband, a provider that now states its business plan was flawed and that it must now partner with companies that control the “last mile” to the home, such as telephone companies or municipalities.¹³ The other major provider is a municipality, Grant County Public Utility District. A municipality certainly is more akin to a RBOC than a CLEC because it possesses similar advantages in the ability to readily deploy fiber via existing rights of way and conduits. Therefore, there is no evidence of CLEC deployment of fiber loops that could show that they are unimpaired without access to fiber loops.

Fiber to Multi-unit Premises. The Commission found substantial impairment for both residential and multiunit premises. As the Commission noted:

When customers typically associated with the mass market reside in multiunit premises, carriers seeking to self-deploy their own facilities to serve these customers face the same barriers as when serving multiunit premise-based enterprise customers. Because we find that the barriers faced by requesting carriers in accessing customers in multiunit premises are not unique to enterprise market customers residing in such premises but extend to all classes of customers residing therein, including residential or other mass market tenants, the conclusions we reach for high-capacity loops in the enterprise market apply equally to mass market customers in multiunit premises.¹⁴

Later in the *Order*, the Commission once again reiterated that “competitive LECs serving customers residing in multiunit premises typically associated with the mass market face the same

¹² Verizon Comments at 17. Verizon’s statistics only show 613,000 business cable modem subscribers.

¹³ Jennifer Dawson, *Eagle Broadband CEO hopes to lift firm to higher ground*, Houston Business Journal (Sept. 1, 2001).

¹⁴ *Order*, ¶ 197, n. 624.

economic and operational barriers as serving customers residing in multiunit premises typically associated with the enterprise market.” *Order*, ¶ 347, n. 1040.

No commenter has demonstrated that CLECs are not impaired in regard to multi-unit premises. Verizon’s contention that 30-35% of the population currently live in multi-unit premises is of no import to the unbundling determination.¹⁵ Accordingly, the Commission should reject Verizon’s request for unbundling relief for fiber to MDUs.

The Commission should also reject the call to treat fiber-to-the-multi-unit premises as FTTH loops even when the inside wiring is copper. Mixed fiber/copper facilities clearly are hybrid loops. Commenters urging this re-definition do not even make a pretense of arguing that these loops can support the types of services that the Commission used to justify the FTTH exemption.

New Dark Fiber . SBC seeks to exempt unbundling obligations for new dark fiber to enterprise customers.¹⁶ Verizon appears to ask for an exemption for all fiber facilities used to serve enterprise customers.¹⁷ The Commission correctly noted that CLECs face heightened impairment in regard to dark fiber due to the greater access ILECs possess to the vast majority of customer locations in their region.¹⁸ This advantage does not disappear for “new” dark fiber. While a CLEC, if it finds self-deployment of fiber feasible to a particular customer, will be able to deploy additional fiber strands to that location and keep that as dark fiber, this additional fiber will be of little use to the CLEC because of the dispersed nature of its customer base. Unless a

¹⁵ In fact, there is greater impairment for CLECs serving multi-unit dwelling as there is limited conduit to these premises. The conduit is needed to pull additional fiber cabling. Traditionally, the builder of a MDU will only place conduit for one telecommunications provider. For another provider to enter the MDU, a hole in the actual structure of the building is often needed. Boring this hole in an existing building, however, would not only be expensive but may damage the structure as well.

¹⁶ SBC Comments at 5.

¹⁷ Verizon Comments at 27.

CLEC had many other customers in the area, the additional fiber strands would be useless to the CLEC. The ILEC, however, can leverage its access to the majority of customer locations in the area to create a network of dark fiber. This is why the Commission noted the sharp contrast between the ILECs, who possess the largest intracity source of dark fiber, and CLECs, who even if they can overcome economic barriers to deployment of dark fiber, can only do so to limited numbers of customer locations.¹⁹ Thus, to create new dark fiber an ILEC can simply extend fiber from its already significant dark fiber resources.²⁰ A CLEC clearly does not stand in the same shoes as the ILEC in regard to such deployment.

In addition, SBC's proposal would be nearly impossible to implement. For instance, how is one to determine what exactly is "new" dark fiber? SBC noted in regard to FTTH loops that "economic deployment of FTTH requires efficient utilization of dark fiber."²¹ Thus, SBC is planning on merely extending its dark fiber to provision FTTH. It will likely do the same in regard to enterprise customers particularly if it has no immediate plans to "light" the fiber. If SBC tacks on new fiber to existing dark fiber will this render it "new" dark fiber? SBC states that it can stamp dates on the fiber cables or color code the sheaths of the cable. SBC states that its loop plant records could also identify "new" dark fiber. The fact that for years RBOCs have precluded CLEC access to these records to verify findings that no dark fiber was available by itself is a sufficient ground for rejecting BOCs' proposal.

¹⁸ *Triennial Review Order*, ¶ 312.

¹⁹ *Triennial Review Order*, ¶ 312.

²⁰ SBC has already noted that it will leverage its existing dark fiber network to deploy FTTH loops. CC Docket No. 01-338, *Ex Parte* Presentation of SBC Communications, Inc. at 10 (January 15, 2003).

²¹ CC Docket No. 01-338, *Ex Parte* Presentation of SBC Communications, Inc. at 10 (January 15, 2003).

Fiber to Enterprise Customers. Verizon's proposed exemption of fiber serving enterprise customers is even less supported.²² The Commission found a lack of impairment only for the highest capacity levels, *i.e.*, OCn levels. ILECs are able to access numerous commercial office buildings in their area because of their ubiquitous network. CLECs do not have such a network and thus face significant costs in providing loops to businesses. Even in the most densely populated commercial districts, CLECs are far behind ILECs in regard to ability to access multi-unit buildings. For instance, in LATA 132, which is in lower Manhattan, and which the Commission has found to be the most competitive area in the nation, Verizon's network serves 7,364 buildings and CLECs serve fewer than 1,000.²³ Since many businesses have multiple locations with varying capacity needs, even if a CLEC has sufficient demand to self-deploy in one location, the demand may be insufficient in the other locations. Thus, CLECs would need access to fiber loops to serve these customers. The Commission has provided the RBOCs an opportunity to rebut the finding of impairment in regard to these facilities at the state level. This is the avenue Verizon should be pursuing.

Verizon also invokes competition in the frame relay and ATM market to contend that CLECs are not impaired in the large business market. AT&T demonstrated that in areas where RBOCs are allowed to provide these services, the RBOCs possess a *de facto* monopoly.²⁴ In fact, ILECs possessed 91.8% market share in the local ATM market.²⁵ This purported

²² Verizon's proposal also appears to go beyond what SureWest requested which is that the Commission should "clarify" that the FTTH exemption applies to all customers. Verizon, however, appears to be advocating an exemption for all fiber serving enterprise customers. This request would go beyond SureWest's request and should be treated as an untimely petition for reconsideration.

²³ CC Docket No. 01-338, AT&T Comments at 158 (4/5/02); CC Docket No. 01-338, WorldCom Comments at 17 (4/5/02).

²⁴ CC Docket No. 01-337, Comments of AT&T Corp. at 25 (2002).

²⁵ *Id.*

“competition,” then, provides no basis to extend fiber unbundling exemptions to the enterprise market.

Fiber-to-the-Curb. For the reasons demonstrated in Commenters’ Opposition, the Commission should reject arguments to extend FTTH to encompass FTTC.²⁶ Catena suggests, without more, that there is no difference between FTTC and FTTH,²⁷ but Commenters pointed out how FTTC is not equivalent to FTTH and that FTTC is more akin to hybrid loops. HTBC admits that only “certain” FTTC loops can provide end users with transmission capacity equivalent to FTTH loops.²⁸ If the goal, as Catena contends, is the promotion of greater advanced service capabilities then FTTH, not FTTC, should be promoted because FTTC will simply be an interim solution, and a “solution” that will soon face bandwidth issues with the advent of new applications. For instance, apparently due to bandwidth constraints, BellSouth is only currently delivering standard voice and DSL products over its FTTC deployment.²⁹ BellSouth is not currently offering video service over this deployment nor does it appear that it has plans to do so in the near future.³⁰

Commenters also rebutted BellSouth’s argument, echoed by Catena, that CLECs and ILECs stand in the same shoes in regard to FTTC. ILECs can leverage their existing fiber network to deploy FTTC. AT&T has noted that BellSouth’s FTTC build-out will simply be an overlay of its existing network. BellSouth has been deploying FTTC since, at least, 1999 and its

²⁶ CC Docket No. 01-337, Opposition of Allegiance Telecom, Inc., *et al.*, at 3, *et seq.* (Nov. 6, 2003).

²⁷ Catena Comments at 9.

²⁸ HTBC Comments at 8.

²⁹ CC Docket No. 01-338, 96-98, and 98-147, AT&T *Ex Parte* Presentation at 2 (Nov. 14, 2003).

³⁰ *Id.* At 3.

FTTC already passes 1 million homes.³¹ Since BellSouth has undertaken this deployment long before the *Triennial Review Order*, it needs no unbundling relief as an incentive to deploy FTTC.

III. THE COMMISSION SHOULD AFFIRM ITS CONCLUSION THAT SECTION 271 CREATES AN INDEPENDENT UNBUNDLING OBLIGATION REQUIRING UNBUNDLING OF BROADBAND FACILITIES.

Some commenters ask the Commission to disregard the separate unbundling obligations applied by Section 271 of the Act particularly in regard to broadband services. The Commission was absolutely correct to reject such an approach, and, in fact, the statute's language provides no discretion to the Commission on this issue. Unlike the "at a minimum" and necessary/impair standards required for unbundling determinations, Section 271 does not even arguably place limitations on the unbundling obligations. In fact, Section 271(d)(4) prevents the Commission from limiting the terms of the Checklist.³² Thus, the Commission has no authority to remove loops used to provide broadband services from Section 271 unbundling requirements.

Petitioners have also failed to justify restrictions on commingling. All the practical and operational reasons that compel commingling of Section 251 UNEs and wholesale services apply with equal force to network elements obtained under Section 271. CLECs are not able to maintain two networks, one comprised of Section 271 elements and another comprised of everything else. Further, the scope of the Commission's unbundling rule already applies to Section 271 elements because those elements are "wholesale" services.

IV. CONCLUSION

For the foregoing reasons, the CLEC Coalition respectfully requests that the Commission deny BellSouth's, SureWest's and USIIA's petitions for clarification and reconsideration.

³¹

Id.

³²

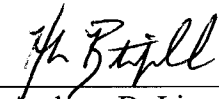
47 U.S.C. § 271(d)(4).

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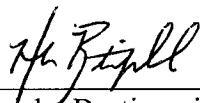
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November 17, 2003

CERTIFICATE OF SERVICE

I, Harisha Bastiampillai, hereby certify that on November 17, 2003, I caused to be served upon the following individuals the Reply Comments Regarding Petitions for Reconsideration in CC Docket Nos. 01-338, 96-98, and 98-147.



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